DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary
Office of the General Counsel
Public Health Division

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To: Richard Price
Chief, Legal Liaison/Policy Review Branch
Division of Legislation and Regulations

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Subject: Contractibility and Divisibility of Regional Treatment Center (YRTC) Resources in Both Title I and Title III of Pub. L. 93-638, as amended.

We have received several requests for a legal opinion of the contractibility and divisibility of funds for the youth Regional Treatment Center (YRTC).[1] At issue is whether The IHS can divide funds for the YRTC into tribal "shares." This question applies the same to Title I and Title III. As we will be more fully explained below, we believe that although the YRTC is contractible, it is not divisible. Consequently, tribal shares are unavailable for the YRTC.

Background

In 1986, Congress passed the Anti-Drug Abuse Act of 1986, P.L. 99-570. As a part of this Act, Congress passed the "Indian Alcohol and Substance Abuse and Prevention and Treatment Act of 1986" found in Title IV, Demand Reduction, Subtitle C - Indians and Alaska

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1. On June 8, 1995, the Headquarters Leadership Team (HQLT) issued guidance to the Aberdeen Area concerning the contractibility and divisibility of YRTCs. In this guidance, the HQLT stated that it recommended seeking a legal opinion from OGC. On June 23, 1995, Mr. T.J. Harwood, Area Director California Area Office, requested a legal opinion on this same issue. On July 3, 1995 the Associate Director for the Office of Health Programs sent to you a Request for a Legal Opinion on this issue. You faxed a copy of all of these documents to Duke McCloud on July 13, 1995.

Natives. Part VI of Subtitle C was entitled "Indian Alcohol and Substance Abuse Treatment and Rehabilitation." Congress has amended this section several times and it currently reads:

> (a) DETOXIFICATION AND REHABILITATION --The Secretary shall develop and implement a program for acute detoxification and treatment for Indian youth who are alcohol and substance abuse users. The program shall include regional treatment centers designed to include detoxification and rehabilitation for both sexes on a referral basis. These regional centers shall be integrated with the intake and rehabilitation programs based in the referring Indian community.
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> (b) TREATMENT CENTERS OR FACILITIES -- (1) The Secretary shall construct, renovate, or, as necessary, purchase, and appropriately staff and operate, a youth regional treatment center in each area under the jurisdiction of an area office. For the purposes of this subsection, the area offices of the Service in Tucson and Phoenix, Arizona, shall be considered one area office and the area office in California shall be considered two area offices, one whose jurisdiction shall be considered to encompass the northern area of the State of California, and one office whose jurisdiction shall be considered to encompass the remainder of the State of California.

§ 704(a) and (b)(1) of Pub. L. 93-437, as amended by P.L.102-573, 25 U.S.C. § 1665c, (originally § 4227 of P.L. 99-570, 25 U.S.C. § 2474.)[2]

These two sections require that the IHS develop a program for acute detoxification including a regional treatment center for detoxification and rehabilitation for both sexes. The IHS should integrate this regional treatment center with the rehabilitation programs in the community. Section 704(d) provides for a community-based rehabilitation and follow-up treatment. However, the community-based rehabilitation service is separate and distinct from the inpatient detoxification services provided by the regional treatment center. Thus, § 704(b) of the IHCIA requires the IHS to establish at least one regional youth treatment center in each area. Moreover, § 704(a) mandates that the IHS provide acute detoxification services on a referral basis. Consequently, this statute has a specific mission --- it requires the IHS to

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2. This section was amended by Pub. L. 100-690 and Pub. L. 102-573.

operate a staff a regional center that provides inpatient acute detoxification services to both sexes on a referral basis.

Analysis

Contractibility

The first question that we must answer is whether the YRTC is contractible under Pub. L. 93-638, as amended. It is our opinion that a YRTC is contractible since there is nothing inherently federal about the operation of a YRTC. Thus, the IHS could contract with a tribe for the operation of the YRTC. However, if a single tribe in a region is proposing to contract with the IHS to operate the YRTC, then resolutions from all tribes in the area is necessary before IHS can award the contract. Section 4(l) of Pub. L. 93-638, as amended, requires that when a "contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." Id., 25 U.S.C. § 450b(l). Since the Congress required the IHS to establish a YRTC in each Area and it intended the YRTC to benefit all tribes in an Area, then all tribes must provide resolutions if a single tribe is contracting to operate the YRTC.

Divisibility

Though a single tribe could contract the operation of the YRTC supported by resolutions, there still remains the question whether a tribe could withdraw its "share" of the funding for the YRTC. For a Title I contract, § 102(a)(1) provides that "[t]he Secretary is directed, upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract or contracts with a tribal organization to plan, conduct, and administer programs or portions thereof, including construction programs . . ." Id., 25 U.S.C. § 450f(a)(1). For a Title III compact, § 303(a) authorizes the IHS to include in the annual funding agreement "programs, services, and functions" that are "otherwise available" to Indian tribes or Indians. At issue is whether the IHS can legally divide the available funding for the YRTC among the tribes in a given area.

Section 704(b) of the Indian Health Care Improvement Act (IHCIA) states that "the Secretary *shall* construct, renovate, or, as necessary, purchase, and appropriately staff and operate, a youth regional treatment center in each area under the jurisdiction of an area office" (emphasis added). This statute is mandatory. Thus, the law requires the IHS to "appropriately staff and operate, a youth regional treatment center" for providing detoxification and rehabilitation for both sexes on a referral basis in each area. Consequently, if the IHS

took the money for the YRTC and divided it into shares, then it would be unable to operate a single center in each area. The failure to operate a youth regional treatment center in each area would violate this statute.

However, § 704 carries no specific penalties for violating the statute. Thus, the IHS would not be subject to a specific penalty for failure to provide regional detoxification services in YTRCs. However, the IHS would be vulnerable to a lawsuit(s) by a tribe or tribes seeking to require the IHS to staff and operate a YRTC as required by law. A single tribe in any Area could sue the IHS if the IHS divided the funds for a YRTC and by that made it impossible to staff and operate a regional facility. In this type of lawsuit, a court would probably require the IHS to operate the YRTC and would probably require the IHS to pay attorneys' fees under the Equal Access to Justice Act (EAJA).

Besides a possible lawsuit, the IHS could be subject to Congressional reprimands or possible Inspector General review for dividing the funds for the YRTC. Precedence exists for this kind of action. In 1992, the Senate held hearings to review the IHS's and BIA's compliance with the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986. At issue during these hearings were two Inspector General Reports which were critical of the BIA's and IHS's implementation of the Act. See generally, Sen. Rep. No. 102-392, 102nd Cong., 2d Sess., at page 32, reprinted in, 1992 U.S. Code Cong. & Admin.. News 3943 at 3974. During these hearings and in the legislative history to the amendments, the Senate chastised the IHS and the BIA for failing to properly implement the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986. Id. Thus, the same thing could happen again if that IHS divided the money for the YRTCs and was unable to operate and staff regional centers.

Therefore, if the IHS divided the funding for YRTCs into tribal shares then it would be violating § 704 if by dividing the IHS was unable to comply with the requirements in § 704 to operate and staff a YRTC in each area. It is our opinion, that funding for YRTCs should remain intact and not be divided. If a Title I tribe proposed contracting for its share of the YRTC, then we suggest declining that portion of the proposal under either the third or fifth declination criterium. 25 U.S.C. § 450f(a)(2)(C) or (E). (The third declination criterion "(C) that the proposed project of function to be contracted for cannot be properly completed or maintained". The fifth declination criterion is "((E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under paragraph (1) because the proposal includes

activities that cannot lawfully be carried out by the contractor.") With a Title III compactor, these funds are earmarked by law to provide regional services to all tribes in an Area.[3]

Finally, § 105(i) requires that if the IHS is required to divide a program that previously was administered to more than the tribe proposing to contract, then the IHS should ensure that services are provided to the tribes not served by the contract. In addition, this section authorizes the IHS to redesign the program. However, this section does not supersede the IHS's legal requirement to operate and staff a YRTC. It is a cardinal rule of statutory construction that courts disfavor repeal by implication. Justice Story stated this principle of statutory construction as early as 1842 when he said:

> The question then arises, whether the [prior act] has been repealed, or whether it remains in full force. That it has not been, expressly or by its terms, repealed, is admitted; and the question resolved itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say, by necessary implication; for it is not sufficient to establish, that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative or auxiliary. But there must be a positive repugnancy between the provisions of the new law, and those of the old; and even then, the old law is repealed by implication, only pro tanto, to the extent of the repugnancy. . . . There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions, to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former.

Id. at 341-42. This principle has been constant from 1842 through today. See, Morton v. Mancari, 94 S.Ct. 2474 (1974) (quoting Posadas v. National City Bank, 56 S.Ct. 349 (1936)) and Hagen v. Utah, 114 S.Ct. 958 (1994). In addition, if two statutory provisions can coexist, then courts are bound to find them both effective. The Supreme Court stated this principle of statutory construction in Mancari when it said that "the courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Id. At 2483. It is our opinion therefore that section

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3. The IHCIA also requires the IHS to perform other functions on a regional basis. For example § 204(d) requires the IHS to employ in each Area Office a diabetes control officer and § 214 requires the IHS to establish an epidemiology center in each Service Area. It would appear that the funding, if any, for these programs are similar to the funding for the YRTC. In addition, there are other mandates in the IHCIA for training and reporting which the IHS may be violating when it divides the funding for these functions.

105(i) does not repeal or supersede the requirements in § 704 for the IHS to staff and operation YRTCs.

Conclusion

It is our opinion that the IHS would be violating § 704 of the IHCIA if it divided funding for YRTCs into tribal shares since the IHS would be preventing its ability to operate and staff a regional youth treatment center that provides detoxification and rehabilitation on a referral basis. Nothing in Pub. L. 93-638 would appear to require a different result. If you have any additional questions or concerns, please do not hesitate to call me on (301) 443-0405.

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